

E-FILED 04-21-2011

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BERRY LYNN ADAMS,

No. C10-00602 LHK (HRL)

Plaintiff,

v.

**ORDER (1) GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO COMPEL; AND (2)
DENYING DEFENDANTS' MOTION
FOR SANCTIONS**

DANIEL L. KRAFT; PHILLIP HAUCK; KIRK
LINGENFELTER; K.P. BEST; J.I. STONE;
CHIP BOCKMAN; R. CALLISON; and SCOTT
SIPES,

[Re: Docket Nos. 98 and 100]

Defendants.

Defendants move for an order compelling plaintiff to respond to their discovery requests. They also move for sanctions. Plaintiff opposes the motions. These matters are deemed appropriate for determination without oral argument, and the April 26, 2011 hearings are vacated. Civ. L.R. 7-1(b). Upon consideration of the moving and responding papers, this court grants in part and denies in part defendants' motion to compel and denies their motion for sanctions.

Defendants first propounded interrogatories and requests for production on plaintiff in September 2010, then re-propounded those requests in December 2010 and January 2011 (modified to reflect the allegations of plaintiff's First Amended Complaint). Defendants granted plaintiff several extensions of time to serve his discovery responses, with the final deadlines for plaintiff's responses being March 16 and March 18, 2011. When plaintiff failed to

1 serve his discovery responses by those dates, defendants filed the instant motion to compel and
2 motion for sanctions. They request an order requiring plaintiff to answer their interrogatories
3 and produce all responsive documents without objection. They also request that plaintiff and
4 his attorney be ordered to reimburse defendants for the fees and costs incurred in bringing the
5 instant motions, as well as their motion for an order shortening time.

6 The failure to timely respond to a discovery request constitutes a waiver of any
7 objection. See Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th
8 Cir.1992). Nevertheless, courts have broad discretion to grant relief, on a case-by-case basis,
9 from any such waiver upon a showing of good cause. See Blumenthal v. Drudge, 186 F.R.D.
10 236, 240 (D. D.C. 1999).

11 Plaintiff says that he was justified in not serving his discovery responses by the due
12 dates because (1) on March 8, 2011, Judge Koh issued an order granting in part and denying in
13 part defendants' motion to dismiss his First Amended Complaint (FAC), with leave to amend as
14 to some claims; (2) defendants filed the instant motions some two weeks later, knowing that
15 plaintiff would be filing a Second Amended Complaint (SAC); (3) plaintiff's SAC was filed on
16 April 7, 2011; and (4) plaintiff does not yet know whether defendants will answer the
17 complaint. In other words, plaintiff argues that defendants' motions should be denied because
18 the requests at issue were, in his view, prematurely served and were, in any event, mooted by
19 the filing of the SAC. He further contends that he should be excused from responding to any
20 discovery until after defendants file an answer.

21 Although plaintiff has now filed his SAC, the essence of plaintiff's allegations appear to
22 be the same. That is, he alleges various constitutional violations of his First, Fourth and
23 Fourteenth Amendment rights, including false arrest, excessive force, and unlawful search.
24 And, although defendants have not submitted to this court copies of their discovery requests, it
25 seems likely that the requests would encompass information pertinent to plaintiff's current
26 allegations, notwithstanding that they might reference allegations that were asserted in his FAC.
27 More to the point, plaintiff's arguments to this court essentially are the same request for relief
28 that Judge Koh has denied—once, reportedly at the December 2010 case management

1 conference,¹ and again more recently—with prejudice—in her March 22, 2011 order denying
2 plaintiff's motion for protective order. (See Docket No. 101).

3 Nevertheless, to the extent the subject discovery requests pertain solely to claims that
4 either (1) have been dismissed with prejudice or (2) have not been revived in the SAC,
5 defendants' motion to compel is denied. Their motion to compel otherwise is granted as
6 follows: Within ten days from the date of this order, and to the extent he has not already done
7 so,² plaintiff shall answer defendants' interrogatories and produce all responsive documents
8 without objection. To the extent plaintiff believes that any discovery response or document
9 produced legitimately implicates his privacy interests, he shall produce that information; but, he
10 may designate the information pursuant to a suitable protective order, notwithstanding his
11 waiver of objections.

12 As for defendants' motion for sanctions, this court finds that defendants have not been
13 seriously prejudiced by plaintiff's delay in serving his discovery responses. Defendants say that
14 they wanted to secure the subject discovery before the parties' scheduled April 28, 2011
15 mediation. The record, however, indicates that defendants repeatedly extended the deadlines
16 for plaintiff's responses—including, on more than one occasion, on a unilateral basis after
17 plaintiff's responses were overdue—even when defendants believed that further extensions
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22 ¹ Defendants say that, at the December 2, 2010 case management conference,
23 they specifically advised the court that they would move to dismiss plaintiff's then soon-to-
24 be filed First Amended Complaint (FAC) and requested a discovery stay on that basis.
25 Plaintiff contends that defendants did not, at that time, make it clear to the court that they
26 intended to move for dismissal. He believes that the court declined to stay discovery at that
time on the assumption that defendants would answer his FAC. Suffice to say that Judge
Koh has made it clear in her March 22, 2011 order denying plaintiff's motion for protective
order that she disfavors any discovery stay.

27 ² While the instant motions were being briefed, plaintiff reportedly served
28 responses to some of defendants' discovery requests. Defendants say that plaintiff has yet to
respond to discovery requests from Best, Stone, Callison, and Sipes. They also argue that the
responses that have been produced are deficient. The sufficiency of plaintiff's responses,
however, are not before the court on the instant motion.

1 were not warranted. Accordingly, defendants' motion for sanctions is denied.

2 SO ORDERED.

3 Dated: April 21, 2011

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6 HOWARD R. LLOYD
7 UNITED STATES MAGISTRATE JUDGE
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1 5:10-cv-00602-LHK Notice has been electronically mailed to:

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5 Counsel are responsible for distributing copies of this document to co-counsel who have not
6 registered for e-filing under the court's CM/ECF program.